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IN THE

# SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1960.

No. 477

ERNEST L. CUNNINGHAM,
Petitioner,

vs.

STATE OF ALABAMA,
Respondent.

## PETITION FOR WRIT OF CERTIORARI.

To the Court of Appeals of Alabama.

ARTHUR D. SHORES,
1527 Fifth Avenue, North,
Birmingham, Alabama,
ORZELL BILLINGSLEY, JR.,
1630 Fourth Avenue, North,
Birmingham, Alabama,
Attorneys for Petitioner.

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## PETITION FOR WRIT OF CERTIORARI
**To the Court of Appeals of Alabama.**

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Petitioner prays that a Writ of Certiorari issue to review the Judgment of the Alabama Court of Appeals.

### CITATIONS TO OPINIONS BELOW.

The opinion of the Court of Appeals is unreported, and is set forth in the Appendix hereto infra p. 1a. The opinion of the Supreme Court of Alabama is unreported, and is set forth in the Appendix hereto, infra p. 6a.

## JURISDICTION.

The Judgment of the Alabama Court of Appeals was entered on June 24, 1958 (R. 187-189), Appendix p. 4a infra.

A petition to the Supreme Court of Alabama for Writ of Certiorari was denied on May 19, 1960 (R. 201), and application for rehearing was overruled on July 14, 1960. The Jurisdiction of this Court is invoked pursuant to 28 United States Code Section 1257 (3), petitioner having asserted below, and asserting here, the deprivation of his rights, privileges and immunities secured by the Constitution of the United States.

## QUESTION PRESENTED.

I. Whether the practice of the Monroe County, Alabama, Jury Commission in selecting Negroes for the Jury Roll results in the arbitrary and systematic exclusion of Negroes on racial grounds from both grand and petit juries in this case, contrary to the equal protection clause of the Fourteenth Amendment.

II. May a State Court, by resting its Judgment upon some ground of Local or general Law or local procedure, defeat the Appellate Jurisdiction of the Supreme Court of the United States, if a federal right or immunity was specially set up or claimed which, if recognized and enforced, would require a different Judgment.

## CONSTITUTIONAL PROVISION INVOLVED.

This case involves the following constitutional provision:

Section 1 of the Fourteenth Amendment to the Constitution of the United States.

## STATEMENT OF THE CASE.

The Judgment of the Alabama Court of Appeals, First Division, entered in this case on June 24, 1958, affirmed a Judgment and sentence of the Circuit Court of the Twenty-first Judicial Circuit in and for Monroe County, Alabama, adjudging the petitioner guilty of First Degree Manslaughter, and sentencing the petitioner to ten years imprisonment.

Execution and enforcement of the Judgment of the Alabama Court of Appeals was stayed on July 21, 1960, by Judge of the Alabama Court of Appeals, Annie Lola Price "for 90 days from the 14th day of July, 1960, to enable appellant, petitioner herein, to apply for and obtain, if he can, a review of said cause, by the Supreme Court of the United States."

The circumstances leading up to this judgment are as follows:

The petitioner, a Negro, while driving an automobile along Alabama Highway #47, near Peterman, Alabama, met and collided with an automobile driven by one Thomas Earl Nettle, and, as a result of the collision, Thomas Earl Nettle was killed. Petitioner was indicted by a Monroe County Grand Jury for Manslaughter in the First Degree, which true bill included the lesser charges of voluntary and involuntary manslaughter (R. 6). The petitioner entered a plea of not guilty (R. 176).

No Negro has ever served on a Grand Jury nor Petit Jury in Monroe County. For this reason petitioner, prior to trial on the merits, filed a Motion to Quash the Indictment on the ground that Negroes were systematically excluded from grand jury service in Monroe County, Alabama, solely because of their race and color. The Motion included allegations that no Negro had served on the

grand jury, which had indicted him, although Negro Males qualified under the State Law. Petitioner declared that the methods followed by the Jury Commission of Monroe County, in selecting the names of Negroes to be placed on the Jury roll, was highly irregular, arbitrary and contrary to the method prescribed by the laws of the State of Alabama, and the Constitution of the United States (R. 9). Petitioner also filed a Motion to Quash the Venire (R. 12), and later filed a Motion to declare void the composition of the jury sworn to try the defendant, both on the constitutional allegations of systematic exclusion of Negroes from Jury service (R. 136).

To prove racial discrimination, the petitioner introduced the 1950 Federal Census reporting 3551 White Males over twenty-one, and 2896 Negro Males over twenty-one.

The first nine witnesses included four attorneys who had practiced law in the County for a number of years, two County Solicitors; two Judges, the Clerk and the Sheriff. Taken together their testimony would seem to indicate that some members of the Colored Race were summoned on almost every venire. The total number on most venires was approximately 45-50, while the number of Negroes tended to range from one to four or five. Furthermore, objections were sustained re any questions directed at whether or not any Negroes ever actually served on a Jury.

The current venire contains the names of two Negroes out of a total of seventy-five (R. 31-34). E. E. Nicholas, Sheriff for thirteen (13) years and life long resident, stated that on the venire for regular Jury of November 28, 1955, he saw the names of the same two Negroes (R. 65).

The next category of witnesses included the Chairman of the Jury Commission, two members and a former member of the Commission and its Clerk.

Their testimony reveals that virtually all of the Jurors were known by at least one of the members of the Commission; that the sources of names were election lists and their (the member) acquaintances. Neither tax, assessment rolls nor the City directory was utilized. Furthermore, the Clerk did not visit the precincts to obtain names or ascertain qualifications (the latter was required under Code of Alabama). Generally, the Commission members do nothing to find out if a Negro is qualified, they merely would say, "I recommend him" (R. 63-66).

W. O. Ryan, Chairman of the Jury Commission for four or five years, failed to bring the Jury roll, even though a subpoena duces tecum was to bring the same. Upon raising said fact in Court, attorney for petitioner stated its purpose was "to determine the number of names on the Jury roll and to determine whether or not he could designate the number of Negroes that he can recognize." Objection sustained (R. 62-63).

When asked what the Commission procedure is in making up the Jury roll, he replied "Well, we just go about getting the names we think are qualified, over the County." (R. 63).

Wilbur Simmons another member of the Jury Commission, admitted that most of the names which he submitted were personal acquaintances. When asked how did he get the names of Negroes he replied, "I know some of them."

Earl Smith, farmer and member of the Jury Commission for six-eight months, stated as best he could remember the jury roll was prepared by putting cards back in the box that had been used in Court (R. 71).

Thirty-four Negroes who had resided in Monroe County for varying length of time all were male, over 21. Ten were either teachers, or ministers, three were insurance agents, six were farmers, two were funeral directors, a

merchant, agricultural extension agent and an interior decorator. None had ever served time in the Penitentiary, suffered severe physical disability, nor been habitual drunkards. None of these had been called for jury duty. Thirteen testified that they had no knowledge whatsoever of any Negroes who had ever been summoned for jury duty. Thirty could not remember more than three, including Scott Parker and Buster Neville, who had been called for the current term, who had ever been summoned. Those who had been in Court on prior occasions could not recall seeing any Negroes who had been summoned to sit on a jury (R. 71-125). The population of Monroe County, Alabama (1950), was about forty-five (45%) per cent Negro.

Fondie Williams, a member of the Jury Commission for four years, testified for the prosecution that there had been no exclusion of prospective jurors from the box because they were Negroes. That "if we considered a man would make a good juryman, we put him in there." The names included some of our acquaintances, and some from the telephone directory, voters, and if we figured he was a good citizen, we put him in. They (members of the Commission) selected only names of persons, white or black—who at least one of them knew (R. 126-127).

After hearing the testimony and considering the evidence offered by petitioner and the State, regarding the above motions, the trial court overruled them (R. 14-137).

## HOW THE FEDERAL QUESTIONS WERE RAISED AND DISPOSED OF.

The Federal Question concerning the right to be indicted by a grand jury and tried by a petit jury from which members of the petitioner's race have been arbitrarily and systematically excluded, because of their race or color, was properly raised before the Alabama Court of

Appeals and disposed of adversely to petitioner's contentions, by resting its decision on grounds of local procedure.

The issue of racial discrimination in jury selection, as prohibited by the equal protection clause, was first raised prior to the trial, at which time petitioner submitted Motions to Quash the Indictment (R. 9-17), Quash the Venire (R. 12-13), and to declare void the composition of the jury as sworn (R. 136). The Trial Court overruled each of these Motions (R. 14-137). Following the verdict, petitioner submitted a Motion for a New Trial (R. 178-181). Paragraphs 15, 17 and 18 of this Motion alleged deprival of the equal protection of the laws as secured by the Fourteenth Amendment to the United States Constitution, in that petitioner was indicted and tried by juries from which members of his race were arbitrarily and systematically excluded because of race or color, as set forth therein in some detail.

The Motion for a New Trial was overruled and exception was made thereto (R. 182).

A Writ of Certiorari by petitioner to the Supreme Court of Alabama (R. 191), specifically raising the jury discrimination point, was denied (R. 201) and his application for rehearing to the Supreme Court of Alabama (R. 212) was overruled (R. 208).

## REASONS FOR GRANTING THE WRIT.

Writ of Certiorari to review the judgment of the Alabama Court of Appeals should issue because it has rested its decision upon a ground of local procedure, where a substantial Federal right or immunity was specially set up, which if recognized and enforced would require a different judgment.

I. The grand and petit juries which indicted and convicted petitioner of first degree manslaughter were bodies

from which members of the Negro race were arbitrarily and systematically excluded by the Jury Commission of Monroe County, Alabama, through the use of a policy which resulted in no Negro serving a petit jury, or grand jury.

II. A matter of vital importance to the public is presented, since the policy and practices under which juries are selected in Monroe County, Alabama, by their operation and their results reveal a scheme to follow the word and evade the spirit of the decisions of this Court, prohibiting the systematic exclusion of Negroes from Jury service because of their race or color.

I.

The testimony in this case shows that petitioner has made out and supported his charge of systematic exclusion of Negroes from Jury service in Monroe County. There are 2806 Male Negroes over twenty-one years of age. Many of whom must be presumed qualified for Jury service. The venires drawn in Monroe County generally contain **45 to 50** names, but the evidence showed that the number of Negro names drawn varied from one to five.

Petitioner submits that it was on just such a showing in **Reece v. Georgia, 350 U. S. 85, 88,** that the Court concluded:

> "This evidence, without more, is sufficient to make a strong showing of systematic exclusion. The sizable Negro population in the County, the fact that all white juries had been serving for as long as witnesses could remember, and the selection of the Jury list of a relatively few Negroes, who would probably be disqualified for actual jury service, all point to a discrimination 'ingenious or ingenuous'. **Smith v. Texas, 311 U. S. 128.**"

There are similar statements in several other cases.[1] In each of these cases, the Court held that on such facts a prima facie case of race discrimination was established, which the State had the burden of rebutting.

In the Reece case, supra, a showing of no Negro service on the grand jury list caused the Court to conclude that "petitioner's Motion stated, and his evidence supported a prima facie constitutional claim." **350 U. S. at 88.**

In **Hill v. Texas, 316 U. S. 400,** no Negro service on the grand jury in a County with a high percentage of literate Negroes, resulted in a finding that "We think petitioner made out a prima facie case . . . " **316 U. S. at 404.** In **Pierre v. Louisiana, 306 U. S. 354, 351,** similar evidence by petitioner "created a strong prima facie showing that Negroes had been systematically excluded because of race, from the grand jury, and the venire from which it was selected".

The State failed to show that the all white petit and grand juries in Monroe County were not the result of a policy and practice of the Jury Commission resulting in the systematic exclusion of Negroes from the jury roll.

The State Statutes under which the Jury Commission functioned left little doubt as to their duty.

"The Clerk of the Jury Commission shall, under the direction of the Jury Commission, obtain the names of every male citizen of the County, over twenty-one . . . . " **Title 30, Section 18, Ala. Code of 1940,** as amended.

"The jury Commission . . . shall make, in a well-bound book, a roll containing the name of every male citi-

[1] Hill v. Texas, 316 U. S. 400, 401-403; Pierre v. Louisiana, 306 U. S. 354; Neal v. Delaware, 103 U. S. 397; Avery v. Georgia, 345 U. S. 559.

zen living in the County who possessed the qualifications herein prescribed . . . ." **Title 30, Sec. 20,** Ala. Code 1940, as amended.

> "The Jury commission shall place on the jury roll and in the Jury box the names of all male citizens of the County, who are generally reputed to be honest and intelligent, and are esteemed in the community for their integrity, good character and sound judgment." Title 30, Sec. 21, Ala. Code of 1940, as amended.

In the face of these clear statutory commands, members of the jury testified that they only put in the names of Negroes whom they knew and who they thought "would make good jurymen."

It is this form of discrimination which can arise from the action of Commissioners who exclude all Negroes whom they do not know to be qualified, and who neither know nor seek to learn whether there are, in fact, any qualified to serve. Hill v. Texas, supra, at 404.

There was testimony that on each venire there were from one to four or five Negroes. The petitioner submits that the very uniformity of the Negro representation on the venire smacks of the form of "proportional representation" held invalid in **Cassell v. Texas, 339 U. S. 282, 287; Shepherd v. Florida, 341 U. S. 50.**

## II.

The issue posed by this case is of vital importance and makes necessary a decision by this Court as to whether the force and effect of its earlier decisions, prohibiting the exclusion of Negroes on juries may now be circumvented by complex schemes, valid on their face, but administered in a manner resulting in either the complete exclusion of Negroes from juries, or their appearance in carefully controlled token numbers.

In a long line of decisions, since **Strauder v. West Virginia, 100 U. S. 303**, this Court has reversed State criminal convictions, because of systematic exclusion of the defendant's race from grand and petit juries. As a result many communities have sought to amend their jury selection laws, rules and practices so as to mask their continuing practice of excluding Negroes from jury service, with a heavy coat of de facto, compliance with the Constitutional standard.

In the past this Court has found in even the most ingenious of these schemes, the same fatal defect present in the case here; the insufficiently explained reason as to why with at least 45% of the persons eligible for jury duty, being Negroes, only a token number has been listed on each venire and none has ever served.

III.

Although the Court of Appeals rested its decision upon local procedural grounds, this Court has said in case: **Chicago, B. & Q. R. Co. v. Illinois ex rel. Grimwood, 200 U. S. 561:**

> "Undoubtedly, the general rule is that where the judgment of the state court rests upon an independent separate ground of local or general law, broad enough or sufficient in itself to cover the essential issues and control the rights of the parties, however the Federal question raised on the record might be determined, this court will affirm or dismiss, as the one course, or the other may be appropriate without considering that question. But it is equally well settled that the failure of the state court to pass on the Federal right or immunity, specially set up of record is not conclusive, but this Court will decide the Federal question, if the necessary effect of the judgment is to deny a Federal right or immunity, specially set up or

claimed, and which, if recognized and enforced, would require a judgment different from one resting upon some ground of local or general law."

Or as stated in **Davis v. Wechaler, 263 U. S. 22, 24**:

"Whatever springs the State may set for those who are endeavoring to assert rights that the State confers the assertion of Federal rights, when plainly and reasonably made, is not to be defeated under the name of local practice." See **Patterson v. Alabama, 294 U S 600.**

## CONCLUSION.

Wherefore, for the reasons hereinabove stated, it is respectfully submitted that this petition should be granted.

ARTHUR D. SHORES,
1527 Fifth Avenue, North,
Birmingham, Alabama.

ORZELL BILLINGSLEY, JR.,
1630 Fourth Avenue, North,
Birmingham, Alabama.

Attorneys for Petitioner

# APPENDIX.

## OPINION OF THE COURT OF APPEALS

Ernest L. Cunningham,

v.

State of Alabama.

(Opinion.)

Harwood, Presiding Judge.

On 5 December, 1955, this appellant was adjudged guilty of manslaughter in the first degree, and on that day gave notice of appeal.

His timely filed motion for a new trial was overruled on 26 December, 1955.

On 9 January, 1956, the court reporter filed a transcript of the evidence with the circuit clerk below, with notice of said filing to the attorneys of record.

The full record was filed in this court on 30 July, 1956, some six months and twenty days after the filing of the transcript of evidence by the reporter.

The Attorney General has filed a motion to strike the record because not timely filed in this court, and to dismiss this appeal.

Supreme Court Rule 37, found in Title 7, Code of Alabama, 1940, as amended 17 February, 1956, requires that the full record be filed in this court within sixty days after the establishment of the transcript of the evidence in the court below. The trial judge may extend the time for the filing of the full record in this court for good cause

for not to exceed thirty days, and as amended, Rule 37 now provides that this extension may be made within the thirty additional days, though in no event shall such extension project the time for filing the transcript of the trial record beyond ninety days. Thereafter, the time for filing in this court may be extended only by this court for good cause shown.

There was no request for extension of time for filing the record in this court made either to the court below, or to this court.

By Section 827 (1a) either party may file objections to the transcript of the evidence as filed by the court reporter, such objections to be filed within ten days after the filing of the transcript of evidence with the circuit clerk. If no objections are filed the transcript is conclusively presumed to be correct as of the date of its filing.

No objections were filed in the court below to the transcript of evidence filed by the reporter in this case.

The following notation in handwriting does not appear in this record following the reporter's certificate to the transcript of the evidence:

"Testimony approved by R. E. L. Key, Solicitor, and Arthur D. Shores, Attorney for Defendant.

"This April 19, 1956.

"A. H. Elliott, Judge."

This notation is of no legal significance. No objections were filed to the transcript, and the trial judge is not required to certify to the correctness of the transcript of the evidence in criminal cases.

The transcript of the evidence, conclusively presumed correct, must be deemed filed on 9 January, 1956. The

entire record was not filed in this court until 30 July, 1956, some four months and twenty days after the date that it should have been filed.

The motion of the Attorney General to strike this record and dismiss this appeal is well taken, and is hereby granted. **Lane v. State**, 38 Ala. App. 487, 87 So. 2d 668; **Clark v. State**, 38 Ala. App. 480, 87 So. 2d 669; **Relf v. State** (Ala. Sup. Ct.), 99 So. 2d 216.

In support of their brief in opposition to the Attorney General's motion to strike the record, counsel for appellant have filed an affidavit by Arthur D. Shores, one of the counsel of record for the appellant, in which it is set forth that the clerk of the circuit court below had requested his aid in assembling the record, as he had not had a similar case, and, further, that because of pending duties of the clerk it was necessary for the clerk to have additional time in preparing the record. It is further averred in the affidavit that both the attorneys for the State, and for the defendant had approved the transcript of the evidence on 19 April, 1956.

It would appear from this affidavit that instead of excusing the delay in filing the record in this court, the attorneys for the appellant were put on notice by the clerk that additional time probably would be needed.

Application for such extension, for cause shown, should have first been addressed to the court below and, if necessary, to this court. Certainly, in the first instance, such information should have been imparted to the trial judge in support of the primary application for extension of time. Supreme Court Rule 37.

As before stated, the entry in the record by the trial judge showing that the transcript of the evidence, as filed by court reporter, was approved by counsel for the defend-

ant and for the State on 19 April, 1956, is of no legal significance. Even so, this entry was made more than sixty days after the establishment of the reporter's transcript of the evidence in the court below.

Record Stricken: Appeal Dismissed.

June 24, 1958.

## Application for Rehearing.

Comes Ernest L. Cunningham, appellant in the above styled cause, and moves this Honorable Court to grant unto him a rehearing in said cause and to reverse, revise and hold for naught its judgment rendered on, to-wit, June 19, 1958, in which the record was stricken and appeal dismissed, affirming the judgment of the Circuit Court of Monroe County, Alabama, and to enter an order reversing said judgment.

Arthur D. Shores,
Orzell Billingsley, Jr.,
Attorneys for Appellant.

August 19, 1958.

It is ordered that the application for rehearing be and the same is hereby overruled.

Per Curiam.

## Arraignment and Judgment.

State of Alabama
vs.
Ernest L. Cunningham

Manslaughter,
First Degree.

This December 5, 1955, came R. E. L. Key, Solicitor, who prosecutes for the State, and also came the defendant in his own proper person and by his attorneys, and the said de-

fendant being duly arraigned upon said indictment charging the defendant with manslaughter in the first degree, for his plea thereto says he is not guilty. Thereupon came a jury of good and lawful men, to-wit, Dennis Turberville, and eleven others, who, being impaneled and sworn according to law, upon their oaths do say: We, the jury, find the defendant, Ernest L. Cunningham, guilty of manslaughter in the first degree, as charged in the Indictment, and fix his punishment at ten (10) years imprisonment in the State Penitentiary.

And now upon this 5th day of December, 1955, the defendant being in open Court, and being asked by the Court if he had anything to say why the sentence of the law should not now be pronounced upon him, says nothing.

It is, therefore, Considered and Adjudged by the Court, and it is the Judgment and Sentence of the Court that the said defendant, Ernest L. Cunningham, be imprisoned in the Penitentiary of the State of Alabama for a term of ten (10) years, and before passing sentence the Court proceeded to ascertain by examination of such convict and other evidence, that such convict was by trade or occupation a laborer, and that the cause of the commission of the crime was unanswered. Said convict is of the male sex, Negro race, and is about 22 years of age and his physical condition is good.

The defendant gave notice of appeal to the Court of Appeals and appeal bond fixed at $3,000.

Sentence suspended pending appeal.

# OPINION OF THE ALABAMA SUPREME COURT

Ernest L. Cunningham

v.

The State of Alabama.

1 Div. 791.

Supreme Court of Alabama.

May 19, 1960.

Rehearing Denied July 14, 1960.

Coleman, Justice.

Defendant was convicted of manslaughter and appeals to the Court of Appeals where the record was stricken and the appeal dismissed because the record was filed in that court ". . . some four months and twenty days after the date it should have been filed". No application for extension of time for filing was made either to the trial court or to the Court of Appeals.

Defendant's application for rehearing in the Court of Appeals was overruled August 19, 1958. Within fifteen days thereafter, on September 1, 1958, defendant filed in the Supreme Court his petition for certiorari to review the judgment of the Court of Appeals. Brief in support of the petition was also filed September 1, 1958.

On the petition for certiorari appears a certificate of counsel that ". . . we have mailed, postage prepaid, properly addressed, a copy of the foregoing Petition to the attorney general, ". . . This 30 day of August 1958".

The brief also bears a certificate which states that counsel for defendant has mailed a copy of the brief in support

of the petition for certiorari, postage prepaid, to the attorney general " . . . on this 30th day of August, 1958."

On September 16, 1958, the attorney general filed in this court a motion to strike the petition for certiorari. The motion to strike recites in pertinent part as follows:

"4. State of Alabama avers that the office of the Attorney General did not receive a copy of the brief of the petitioner-appellant in support of his petition for writ of certiorari until the morning of Friday, September 12, 1958, and further that said copy of the brief of petitioner-appellant so received was not mailed to the office of the Attorney General until September 11, 1958, from the city of Birmingham, Ala., which date of mailing is more than fifteen days from the date of the overruling in this cause of petitioner-appellant's application for rehearing in the Court of Appeals on August 19, 1958. In support of this allegation, the State of Alabama attaches hereto and makes a part hereof affidavits of Dorothy Hall and Bernard F. Sykes, together with an exhibit attached to the latter affidavit.

"5. The State of Alabama further avers that the Office of the Attorney General has not received, as of this date, a copy of the petition for writ of certiorari.

"6. The State of Alabama avers that neither a copy of the petition for writ of certiorari nor a copy of the brief in support thereof was mailed to the Office of the Attorney General within fifteen days from August 19, 1958, the date upon which application for rehearing was overruled in said Court of Appeals and that said petition for writ of certiorari to the Court of Appeals has not been filed in accordance with the rules of this Honorable Court and particularly, Rules 11, 39 and 44, and that said petition for Writ of Certiorari

should be stricken or dismissed by this Honorable Court."

The affidavits which accompany the motion to strike support the allegations of the motion. The exhibit to affidavit of Bernard F. Sykes is an envelope. The name and address of an attorney are printed on the upper left-hand corner of the envelope. The name of one of the attorneys on the brief and the address on the brief are the same as the name and address printed on the upper left-hand corner of the envelope. The envelope is addressed to the attorney general and bears the metered postmark of: **Birmingham, Ala., Sept. 11, '58**

The affidavit of Dorothy Hall states that between 8:30 A. M. and 8:30 A. M. on September 12, 1958, in the course of her employment in the office of the attorney general she opened the mail addressed to that office; that on said date a copy of the brief in support of the petition for certiorari in the instant case was received in said office in an envelope; and that after opening the envelope she threw it, along with other envelopes, into a waste basket next to her desk.

The affidavit further recites:

> ". . . . I am informed and believe and upon said information and belief state as a fact that an envelope with a return address thereon 'Law Offices, Arthur F. Shores, 1630 Fourth Avenue, No., Birmingham, Alabama,' addressed to 'Hon. John Patterson, Attorney General, State of Alabama, Montgomery, Alabama,' and postmarked 'Birmingham, Ala., Sep 11 '58,' was found by Bernard F. Sykes about 9:30 on the said morning I am referring to in the said wastepaper basket, along with other envelopes which had contained the mail to the Attorney General's Office that morning and that said envelope with said return address thereon is the only one which was received on

the morning of Friday, September 12, 1958, from the law offices of Arthur D. Shores.

"I know that the above referred to brief and argument was received on the morning of Friday, September 12, 1958, in the Office of the Attorney General and according to my best information and belief said brief and argument was contained in said above described envelope postmarked September 11, 1958, Birmingham, Alabama."

The affidavit of Bernard F. Sykes states that he is chief of the criminal division of the attorney general's office and recites that:

"On the morning of Friday, September 12, 1958, at approximately 9:30 A. M., I found a copy of a brief and argument styled **Ex parte Ernest L. Cunningham, Ernest L. Cunningham, Appellant, v. State of Alabama, Appellee,** entitled Appellant's Brief and Argument in Support of Petition for Writ of Certiorari, containing a certificate purportedly signed by Arthur D. Shores, Attorney for Appellant, that a copy of said brief had been mailed to the Attorney General of Alabama on the 30 day of August, 1958. This carbon copy of the brief and argument was found on my desk, endorsed in the handwriting of my secretary, Mrs. Frances Walter, 'Rec'd 9-12-59-late.' This is the same brief and argument referred to and described in an affidavit made by Miss Dorothy Hall under date of September 12, 1958.

"After observing the said brief and inspecting the certificate of service thereon, I determined that the application for rehearing in the Court of Appeals in said cause was overruled on August 19, 1958, and that the fifteenth day thereafter, the time for serving a copy of the brief in support of a petition for writ of certiorari in said cause was the 3rd day of September, 1958.

"In order to verify the date upon which the office of the Attorney General received the brief of petitioner, I searched each envelope in a certain wastepaper basket near the desk occupied by Miss Hall at the time that **he** had opened the mail on the morning of Friday, September 12, 1958. I found several envelopes, one of which was an envelope addressed to 'Hon. John Patterson, Attorney General, State of Alabama, Montgomery, Alabama', with the return address thereon 'Law Offices, Arthur D. Shores, 1630 Fourth Avenue No., Birmingham, Alabama;' which envelope was postmarked 'Birmingham, Ala. Sep 11 '58.' The said envelope is attached to this affidavit and marked for identification Exhibit A.

"This office has not heretofore received a brief in the case of **Ex parte Ernest L. Cunningham. Ernest L. Cunningham, Appellant v. State of Alabama, Appellee**, in the Supreme Court on petition for certiorari to the Court of Appeals, and the brief received on September 12, 1958, is the only brief that this office has received in connection with said certiorari proceedings."

The affidavits and envelope compel us to conclude that the copy of Brief sent to the attorney general was not mailed until September 11, 1958. Defendant has not replied to or controverted the motion to strike.

The rule is clearly established that for consideration of a petition for certiorari to the Court of Appeals by the Supreme Court, one prerequisite is that the adverse party or his counsel shall be served with a copy of the brief of petitioner within fifteen days after action by the Court of Appeals on application for rehearing. Supreme Court Rules 11, 39, 44. Code 1940, Title 7, Appendix, Cum. Pocket Parts: 261 Ala. XIX, et seq.; **Bruner v. State**, 2[illegible] Ala. 357, 91 So. 2d 224; **Gambrell v. Bridges**, 266 Ala. 32

96 So. 2d 182; **Golden v. State**, 267 Ala. 456, 103 So. 2d 62; **Adkins v. State**, 268 Ala. 548, 109 So. 2d 749; **Bozeman v. State**, 269 Ala. 610, 114 So. 2d 914; **Thorpe v. State**, ... Ala. ..., 119 So. 2d 222. In the instant case, application for rehearing was overruled by the Court of Appeals on August 19, 1958. Fifteen days after that day expired at midnight September 3, 1958. We are compelled to conclude that copy of brief in support of the petition for certiorari was mailed eight days late and was not served on the attorney general within the required time.

In **Golden v. State**, supra, the requirement as to time for mailing copy of brief to opposing counsel on petition for certiorari to the Court of Appeals was fully considered and authorities cited. In the **Golden** case, within the prescribed time, the attorney general had filed in this court, a petition for certiorari to the Court of Appeals and supporting brief, but had failed to mail a copy of the brief to opposing counsel within fifteen days after the Court of Appeals had overruled application for rehearing. In that case, for that reason, we said:

> "... we have no alternative but to grant Golden's motion to strike the State's petition for certiorari and brief filed in support thereof (Citations omitted)." (267 Ala. 456, 457).

Likewise, in the instant case we have no alternative and the motion to strike must be granted.

Motion to Strike Petition for Certiorari Granted.

Simpson, Goodwyn and Merrill, JJ., Concur.

**On Rehearing.**

On application for rehearing, petitioner cites **Clark v. State**, 239 Ala. 10, 193 So. 320, and similar cases which state that the former statute relating to striking bills of

exception because of delay in presenting or signing same did not rest in the Attorney General the exclusive right to decide, by moving to strike, that denial of constitutional rights of defendants in criminal cases may not be reviewed, and, in ruling upon such motion, this court would examine the bill of exceptions to see if any constitutional right had been denied.

In **Patterson v. Alabama**, 294 U. S. 600, 605, 55 S. Ct. 575, the late Mr. Chief Justice Hughes wrote concerning our former statute, § 6434, Code 1923, as follows:

> ". . . For it does not appear that the failure to file a bill of exceptions in time is sufficient in itself to deprive the state appellate court of jurisdiction. On the contrary, the statute of Alabama expressly denies to the court the authority, on its own motion, to strike a bill of exceptions because not filed in time, and provides for that action only upon motion of a party to the record or his attorney. The statute in terms allows parties to waive the objection. . . ."

It thus appears that under § 6434, Code 1923, this court had authority to examine a bill of exceptions, although not timely presented or signed, because timely presentation and signing were not jurisdictional. That is not true as to compliance with our former Rule 44 and present Rules 11, 39 and 44.

In **Burch v. State**, 249 Ala. 72, 29 So. 2d 425, this court held that old Rule 44 had not been complied with where brief supporting petition for certiorari to the Court of Appeals had not been served on opposing counsel within fifteen days as provided by the rule, although such brief had been mailed within fifteen days. Present Rule 39 requires such brief to accompany the petition for certiorari which must be filed within fifteen days as specified in the Rule. Rule 11 requires that such brief shall be served on

the adversary by delivery or mailing, and Rule 44 specifies how service personally or by mail shall be made. In **Oliver v. State**, 256 Ala. 295, 54 So. 2d 618, with respect to old Rule 44 this court said:

> "It is obvious, on the face of the petition, that Supreme Court Rule 44, Code 1940, Tit. 7, Appendix, has not been complied with. Compliance with Rule 44 is jurisdictional. The petition for certiorari is therefore stricken."

See also: **Dawson v. State**, 259 Ala. 205, 66 So. 2d 568; **Johnson v. State**, 261 Ala. 373, 74 So. 2d 508; **Reserve Life Ins. Co. v. Longshore**, 262 Ala. 95, 77 So. 2d 392.

In the cases cited on original deliverance, this court uniformly held that failure to serve brief on the adversary in time was a failure to comply with present Rules 11, 39 and 44, and that compliance with those rules as to timely service of brief is a prerequisite for consideration of petition for certiorari to the Court of Appeals. Complainant with those rules is a prerequisite in the instant case, and because of petitioner's failure to comply we are without jurisdiction to entertain the instant petition.

Opinion extended.

Application overruled.

Simpson, Goodwyn and Merrill, JJ., Concur.